

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AMAA Docket No. 04-0002
)	
Marvin D. Horne and)	
Laura R. Horne, d/b/a)	
Raisin Valley Farms, a partnership)	
and d/b/a)	
Raisin Valley Farms Marketing Association,)	
also known as)	
Raisin Valley Marketing, an unincorporated)	
association)	
)	
And)	
)	
Marvin D. Horne,)	
Laura R. Horne,)	
Don Durbahn and)	
The Estate of Rena Durbahn, d/b/a)	
Lassen Vineyards, a partnership)	
)	
Respondents)	Decision and Order

This is a disciplinary proceeding under the Agricultural Marketing Agreement Act of 1937, (AMAA), as amended, 7 U.S.C. § 601 *et seq.* It was instituted by the United States Department of Agriculture’s Administrator of the Agricultural Marketing Service (AMS) who alleged that respondents did not comply with the provisions of the federal marketing order and the implementing regulation that applied for crop years 2002-2003 and 2003-2004 to first handlers of raisins produced from grapes grown in California (7 C.F.R. §§ 989.1-989.95 (Raisin Order), and 7 C.F.R. § 989.166 (Reserve tonnage regulation)). Under the Raisin Order and the Reserve tonnage regulation, first handlers are required to: (1) obtain inspections of raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold acquired raisins designated as reserve tonnage for the account of the Raisin

Administrative Committee (RAC) (7 C.F.R. § 66 and 7 C.F.R. § 989.166); (3) file accurate reports with the RAC (7 C.F.R. § 73); (4) allow access to their records to verify their accuracy (7 C.F.R. § 989.77); and (5) pay assessments to the RAC (7 C.F.R. § 989.80). Respondents dispute that they are handlers in that they never obtained any raisins through purchase or transfer of ownership to any of the business entities that they operate and argue, therefore, they did not *acquire* raisins within the meaning of the Raisin Order. Respondents further argue that they are not subject to the requirements of the Raisin Order because they are farmers/producers who have acted in good faith to advance the stated policy of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006.

I held oral hearings in Fresno, California at which transcribed testimony was taken and exhibits were received (February 9-11, 2005 (Tr. I); May 23, 2006 (Tr. II)). AMS was represented at the first hearing by Frank Martin, Jr., Esq. who was joined at the second hearing by Babak A. Rastgoufard, Esq. Both are attorneys with the Office of the General Counsel, United States Department of Agriculture. Respondents were represented by David Domina, Esq. and Michael Stumo, Esq. Complainant and respondents simultaneously filed their second post-hearing proposed findings, conclusions and supporting briefs on November 1, 2006.

Upon consideration of the record evidence, review of the provisions of the controlling Raisin Order, regulations and applicable and cited statutes, as well as the arguments of the parties, I have found and concluded that respondents Marvin D. Horne, Laura R. Horne, Don Durbahn and Reba Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards, at all times material herein, acted as a first

handler of raisins subject to the inspection, assessment, reporting, verification and reserve requirements of the Raisin Order and the Reserve tonnage regulation. I further find that these respondents violated the AMAA and the Raisin Order by failing to obtain inspections of acquired incoming raisins; failing to hold requisite tonnages of raisins in reserve; failing to file accurate reports; failing to allow access to their records; and failing to pay requisite assessments. I have concluded that the Farmer-to-Consumer Direct Marketing Act of 1976 has not exempted farmers/producers who act as handlers from being subject to regulation by federal marketing orders. I have further concluded that the violations by Marvin D. Horne, Laura R. Horne and Don Durbahn, on behalf of and doing business as Lassen Vineyards, require the entry of an order directing them to pay the RAC assessments they have failed to pay, and to pay the RAC the dollar equivalent of the raisins they failed to hold in reserve. Moreover, I have concluded that their violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order, and a civil penalty should therefore be assessed against them (excluding Rena Durbahn, now deceased) pursuant to 7 U.S.C. § 608c(14)(B), in the amount of \$731,500.

Findings of Fact

1. Marvin D. Horne is a farmer who has farmed since 1969, growing Thompson seedless grapes for raisins. He does business with his wife Laura R. Horne as “Raisin Valley Farms” which is a registered trademark for their grape growing and raisin producing activities that are the largest in the California valley where most of the world’s raisins are produced (Tr. I, at 868-869). Marvin D. Horne and Laura R. Horne also do business as Raisin Valley Farms Marketing Association (also known as Raisin Valley

Marketing). Both Raisin Valley Farms and Raisin Valley Farms Marketing Association have the same business mailing address: 3678 North Modoc, Kerman, California 93630 (Tr. I, at 873).

2. During the 2002-2003 and 2003-2004 crop years, Marvin D. Horne and Laura R. Horne also operated a general partnership with Laura's father, Don Durbahn, and Laura's mother, Rena Durbahn (now deceased). This partnership did business and continues to do business as Lassen Vineyards at 2267 North Lassen, Kerman, California 93630. Prior to 2002, Lassen Vineyards was exclusively a farming partnership that produced Thompson seedless grapes made into raisins (Tr. I, at 870). In 2001, the partnership ordered packing plant equipment that it commenced to use in 2002 (Tr. I, at 871-873).

3. Marvin D. Horne was a member or alternate member of the RAC for six years (Tr. I, at 175). As early as 1998, Marvin D. Horne and Laura R. Horne indicated to the RAC their interest in acting as a handler of California raisins under the Raisin Order (CX 94). In crop years 2001-2002, 2002-2003, and 2003-2004, Mr. and Mrs. Horne's partnership, Raisin Valley Farms, filed notifications with the RAC of intentions to handle raisins as a packer under the Raisin Order (CX-98, CX-100 and CX-102).

4. Mr. Horne has both met and corresponded with representatives of the United States Department of Agriculture who have advised him concerning his responsibilities as a handler under the Raisin Order (CX-94, RX-100-103, RX 113, Tr. I, at 169-171).

5. On March 15, 2001, Marvin D. Horne and Laura R. Horne, acting as Raisin Valley Farms, through their then attorney, wrote to the Secretary of Agriculture and asked whether the obligations of the federal raisin marketing order regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee and reporting requirements would apply if Raisin Valley Farms had its raisins “custom packed” by the Del Rey Packing Company, a packer that would not take title to Raisin Valley Farms’ raisins. On April 23, 2001, the Deputy Administrator, Fruit and Vegetable Programs, United States Department of Agriculture, replied on behalf of the Secretary (RX 98 (Appendix A); and Tr. II, at 957-960). The Deputy Administrator explained that under such circumstances, Raisin Valley Farms would be neither a packer nor a handler, but that Del Rey would be both. This type of arrangement, in which the grower retains title and has his raisins packed for a fee is, the Deputy Administrator explained, comparable to “toll packing”, a form of raisin acquisition by a handler that was recognized as such by the promulgation record underlying the Raisin Marketing Order. He further explained that under section 989.17 of the Raisin Order, 7 C.F.R. § 989.17, once an entity has or obtains physical possession of raisins at a packing or processing plant, it has “acquired” raisins within the meaning of the section, and thus Del Rey would:

...be required to meet the order’s obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements.

(RX 98 (Appendix A), at 1).

The Deputy Administrator enclosed portions of the 1949 Recommended Decision and hearing testimony relevant to the question that showed it had been expressly

considered and discussed in the hearing record and in the Secretary's stated rationale for promulgating the Raisin Order. (These enclosures are part of RX 98, attached to this Decision and Order as Appendix A).

6. On April 23, 2002, Mr. and Mrs. Horne notified the Secretary of Agriculture that they were registering as a handler under the Raisin Order under protest, but agreed to comply with its volume control (reserve) provisions (CX-101).

7. Marvin D. Horne was also specifically advised, on May 20, 2002, by the Administrator of Marketing and Regulatory Programs, AMS, in response to an e-mail and a letter Mr. Horne had sent to the Secretary of Agriculture, that if he packed and handled his own raisins:

Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.

(RX 101, attached to this Decision and Order as Appendix B).

8. The Departmental interpretations of the terms of the Raisin Order that Marvin D. Horne requested and received were expressly disregarded. Though he did not have Del Rey custom pack his raisins, Mr. Horne elected to set up a family-owned toll packing operation at Lassen Vineyards and pack raisins for his family, and for growers for a fee (Tr.1, at 977). Contrary to the interpretive advice Marvin D. Horne had received from USDA, Lassen Vineyards did not pay any assessments, did not have any incoming inspections performed, did not file any reports, and did not hold any raisins in reserve in respect to any of the raisins Lassen Vineyards received from and packed for growers during the 2002-2003 and 2003-2004 crop years (Tr. I, at 965-973).

9. Lassen Vineyards, a general partnership operated by Marvin D. Horne, together with his partners, Laura R. Horne, Don Durbahn, and the late Rena Durbahn, owned land at 2267 N. Lassen, Kerman, California 93630, where they owned and operated equipment and a raisin packing plant that they used, in the crop years 2002-2003 and 2003-2004, to stem, sort, clean, grade and package California raisins for themselves and, for a fee, for others (Tr. II, at 25-27, and 962). The only difference Mr. Horne could state between the way packing was conducted at Lassen Vineyards and by a toll packer charging a fee for sorting, cleaning and packing raisins in boxes was that the packed product could leave Lassen Vineyards without the farmer being required to pay fees up front (Tr. I, at 979).

10. During crop years 2002-2003 and 2003-2004, Lassen Vineyards charged producers a 12 cent per pound fee to pack raisins and five dollars for the use of each pallet upon which the boxed raisins were stacked (Tr. II, at 28 and 44). The cost for labor and packaging materials was included in the fee charged (Tr. II, at 30-31, 44, and 48). Some raisin producers were given discounts from these fees for services they performed or the volumes of raisins they had packed at the plant (Tr. II, at 39-43). The packing activities at Lassen Vineyards were supervised by Don Durbahn and by Marvin A. Horne, Mr. and Mrs. Marvin D. Horne's son (Tr. I, at 879-880). The workers who performed the packing activities at Lassen Vineyards were "leased employees" who were leased by Laura R. Horne and Rena Durbahn for Lassen Vineyards (Tr. I, at 933-934). All of the raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004, were packaged in boxes stamped with the handler number 94-101 that had been assigned to Marvin D. Horne and Laura R. Horne (Tr. I, at 964-965).

11. During crop years 2002-2003 and 2003-2004, Mr. and Mrs. Horne also conducted business as a not-for-profit unincorporated grower association named Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). It was formed by Mr. and Mrs. Horne to “attract the market of buyers” and allow them and other raisin growers to market their raisins together under the Hornes’ protected trade name “Raisin Valley Farms” (Tr. II, at 874-878). Sixty raisin growers were members of Raisin Valley Farms Marketing Association (Tr. II, at 55). Mr. Horne conducted the marketing activities of Raisin Valley Farms Marketing Association and sold the packaged raisins either himself or through brokers (Tr. II, at 38 and 49). When the sale of the packaged raisin was negotiated through a broker, the grower whose raisins were sold had the brokerage fee and the fee for the packing performed by Lassen Vineyards deducted from his payment check (Tr. II, at 50-51). When the sale was made without an outside broker, the grower’s payment check was reduced by the fee for the packing services performed by Lassen Vineyards and by charges by the Association in the form of an accounting fee and for a fund to protect members from customers who fail to pay (Tr. II, at 51-52). Mr. Horne acknowledged that Lassen Vineyards benefited under these arrangements from the fees that it received from growers for “the rental of its equipment” (Tr. II, at 52).

12. When Mr. Horne or a broker found a buyer who desired raisins, Mr. Horne contacted one of Raisin Valley Farms Marketing Association’s members on a rotational basis (that included the Raisin Valley Farms and the growing operations of Lassen Vineyards) and asked them to bring their raisins to Lassen Vineyard’s packing plant to be stemmed, sorted, cleaned, graded and packaged (Tr. II, at 55-57). After the raisins were packed, the buyer’s trucks picked them up, left a bill of lading and when the buyer paid,

the money went into an Association bank account, out of which the grower was paid less deductions for brokerage, if any, and the packing fees owed and paid to Lassen Vineyards (Tr. II, at 58-60).

13. On or about August 3, 2002, the respondents¹ submitted an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the RAC that they did not acquire any California raisins during this time period. However, the record evidence shows that they acquired substantial amounts of California raisins during this time period (CX-1-2, CX-62, CX-82-87, CX-171-582, Tr. I, at 76-79 and 188-190).

14. From August 1, 2003 to November 30, 2003, the respondents submitted 13 inaccurate RAC-1 Forms Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the RAC that they did not acquire any California raisins during this time period. However, the record evidence shows that they acquired substantial amounts of California raisins during this time period (CX-3-56, CX-63-75, CX-171-582, Tr. I, at 80-101).

15. From August 1, 2003 to November 30, 2003, the respondents submitted four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC. The respondents reported to the RAC that they did not ship or dispose of any California raisins during this time period. However, the record evidence shows that the respondents shipped substantial amounts of California raisins during this time period (CX-3-56, CX-76-79, CX-171-582, Tr. I, at 80-101).

¹ As hereinafter used in the Decision and Order, “the respondents” refers to Marvin D. Horne, Laura R. Horne, Rena A. Durbahn and Don Durbahn acting on behalf of or doing business as Lassen Vineyards.

16. During crop year 2002-2003, the respondents submitted an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California raisins during this time period (CX-1-2, CX-80, CX-82-87, CX-171-582, Tr. I, at 76-79).

17. During crop year 2002-2003, the respondents submitted an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California raisins during this time period (CX-1-2, CX-81-87, Tr. I, at 76-79).

18. During crop year 2002-2003, the respondents failed to obtain incoming inspections on approximately 1,504,020 pounds of California raisins (CX-170-582, Tr. I, at 76-79).

19. During crop year 2003-2004, the respondents failed to obtain incoming inspection on fifty-two occasions for approximately 2,066,066 pounds of California raisins (CX-3-54, CX-56, Tr. I, at 90, 97-99 and 967-970).

20. During crop year 2002-2003, the respondents failed to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins (CX-1, CX-2, CX-171-582, Tr. I, at 176-179, 965 and 973). During crop year 2002-2003, the free tonnage price (field price) for California raisins was \$745.00 a ton (CX-583). The

respondents failed to pay \$275, 501, to the RAC for California raisins they failed to hold in reserve for crop year 2002-2003 (CX-161, CX-171-582, Tr. I, at 972-973). The RAC issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

21. During crop year 2003-2004, the respondents failed to hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins (CX-3-54, CX-89, Tr. I, at 90 and 222-225). During crop year 2003-2004, the free tonnage price (field price) for California raisins was \$810 a ton (CX-93, CX-583, Tr. I, at 225). The respondents failed to pay \$247,536.00, to the RAC for California raisins they failed to hold in reserve for crop year 2003-2004 (CX-89, Tr. I, at 225 and 972-973). The RAC issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

22. During crop year 2002-2003, the respondents failed to pay assessments to the RAC of approximately \$3,438.10 (CX-1-2, CX-171-582, Tr. 1, at 76-79 and 217-222).

23. During crop year 2003-2004, the respondents failed to pay assessments to the RAC of approximately \$5,951.63 (CX-3-54, Tr. I, at 90, 222-226, and 972-973).

24. The respondents failed to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access (CX-153, CX-154, CX-164, RX-106, Tr. I, at 422-432 and 946-947).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. On August 3, 2002, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)), by submitting an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC).
3. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. §989.73(b)), by submitting thirteen inaccurate RAC-1 Forms, Weekly Reports of Standard Raisin Acquisitions, to the RAC.
4. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(d) of the Raisin Order (7 C.F.R. §989.73(d)), by submitting four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC.
5. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC for crop year 2002-2003.
6. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC for crop year 2002-2003.
7. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), by failing to obtain incoming inspections for approximately 1,504,020 pounds of California raisins for crop year 2002-2003.

8. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), on fifty-two occasions by failing to obtain incoming inspections for approximately 2,066,066 pounds of California raisins for crop year 2003-2004.

9. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166 of the Regulations (7 C.F.R. §989.166), by failing to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins, and by failing to pay to the RAC \$275,501.00, the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003.

10. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166 of the Regulations (7 C.F.R. § 989.166), by failing to hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins, and by failing to pay to the RAC \$247,536.000, the dollar equivalent of the California raisins that were not held in reserve for crop year 2003-2004.

11. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately \$3,438.10 for crop year 2002-2003.

12. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately \$5,951.63 for crop year 2003-2004.

13. The respondents violated section 989.77 of the Raisin Order (7 C.F.R. §989.77), by failing to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access.

Discussion

The handling of California raisins is subject to the requirements of the Raisin Order that came into being at the request of the raisin industry. The industry request was made to the Secretary of Agriculture pursuant to the AMAA that provides marketing tools for avoidance of disruption of the orderly exchange of agricultural commodities in interstate commerce (7 U.S.C. § 601). Among the marketing tools authorized by the AMAA for inclusion in marketing orders, are provisions that require handlers to comply with commodity inspection provisions and reserve pool requirements that withhold for a time a portion of an agricultural commodity from the market in order to keep prices from being depressed and to yield an equitable distribution of the net returns realized in the future when the reserve is sold (7 U.S.C. § 608c(6)(E)and(F)). The AMAA also authorizes marketing orders to be administered by industry committees and for the issuance of rules and regulations to effectuate the provisions of the marketing order (7 U.S.C. § 608c(7)(C) and(D)). The constitutionality of marketing orders promulgated pursuant to the AMAA has been upheld by the Supreme Court:

Appropriate respect for the power of congress to regulate commerce among the States provides abundant support for the constitutionality of these marketing orders....

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 427, 476, 117 S. Ct. 2130, 2141, 138 L.Ed. 585 (1997).

Provisions in marketing orders that require handlers to hold a portion of a commodity in reserve and pay assessments to an Administrative Committee to defray its expenses cannot be used as grounds for a taking claim since handlers no longer have a property right that permits them to market their crop free of regulatory control. *Cal-*

Almond, Inc., 30 Fed Cl. 244, 246-247 (1994), *affirmed*, 73 F. 3d 381, *cert. denied*, 519 U.S. 963 (1996).

Nor may a person classified as a handler by a marketing order and made subject to its regulatory control, successfully assert an equal protection challenge when the Secretary has set forth a rational basis for the classification. *Lamers Dairy Inc.*, 60 Agric Dec. 406, at 428 (2001) *citing*, *F.C.C. v. Beach Communications, Inc.* 508 U.S. 307, 313 (1993),

In response to a request for a marketing order from the California raisin industry, a hearing was held at Fresno, California on December 13 through 16, 1948. Upon the basis of the evidence received at the hearing, a decision was issued that recommended the promulgation of the Raisin Order and enunciated a rational basis for its issuance and for its various terms and provisions (14 Fed Reg 3083). Interested parties were given an opportunity to file written exceptions to the recommended decision (*Ibid*). Upon consideration of the exceptions that were filed and the record evidence presented at the hearing, the Secretary of Agriculture, on July 8, 1949, found that the issuance of the Raisin Order as set forth in the recommended decision, would effectuate the declared policy of the AMAA, and ordered that a referendum be conducted among producers of raisin variety grapes grown in California to determine whether at least two-thirds of them favored its issuance (14 Fed. Reg. 3858 and 3868). The referendum was conducted and the requisite percentage of producers was found to favor the Raisin Order's terms and provisions. Those terms and provisions, as periodically amended through subsequent rulemaking proceedings, were fully applicable and governed the handling of California

raisins during the 2002-2003 and 2003-2004 crop years when respondents via their partnership Lassen Vineyards, acted as first handlers of raisins.

Marvin D. Horne, his family and the growers who joined his marketing association decided to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, respondents obtained an unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order and its regulations. That is what this proceeding is really about. Respondents' discussion of what *acquire* means and their expressed desire to achieve the policy of the Farmer-to-Consumer Direct Marketing Act are simply attempts to divert attention from their efforts to gain unfair advantage by freeing themselves from regulations the rest of their industry observed as the best way for all raisin growers and handlers to realize optimum prices.

The Raisin Order's regulatory provisions apply to "handlers" who "first handle" raisins. A "handler" is defined in the raisin order to include "any processor or packer" (7 C.F.R. § 989.15). A "packer" is defined as meaning "...any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" (7 C.F.R. § 989.14). A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

Acquire means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him....*Provided...*, That the term shall apply only to the handler who first acquires raisins.

7 C.F.R. § 989.17, emphasis by underlining added.

Findings of Fact 7, 8 and 9, conclusively demonstrate that the respondents in their operation of the packing house they owned as Lassen Vineyards came within each of these definitions during crop years 2002-2003 and 2003-2004. As such they were

required as a handler to: (1) cause an inspection and certification to be made of all natural condition raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold in storage all acquired reserve tonnage as established by the controlling Reserve tonnage regulation (7 C.F.R. § 989.66, and 7 C.F.R. § 989.166); (3) file certified reports showing: inventory, acquisition and other information required by the Raisin Committee to enable it to perform its duties (7 C.F. R. § 73); (4) allow access to inspect the packing house premises, the raisins held there, and all records for the purposes of checking and verifying reports filed (7 C.F.R. § 989.77); and (5) pay assessment to the Raisin Committee with respect to free tonnage acquired, and any reserve tonnage released or sold for use in free tonnage outlets (7 C.F.R. § 989.80).

Respondents' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining acquire. Moreover, if there was any ambiguity, the interpretation given by the Department of Agriculture both at the time of the Raisin Order's issuance and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing and controlling. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); and *Barnhart v. Walton*, 535 U.S. 212, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002).

The 1949 proposed decision which was adopted as part of the Secretary's final decision, after explaining the need for the Raisin Order, explained the language employed and clarified that:

The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor") in that the regulatory features of the order would apply to any

handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration;....

14 Fed. Reg. 3086 (1949).

This interpretation was consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

Q. Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?

A. The man who performs the packing operation, who is the packer.

Q. Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone for a fee?

A. That is right.

Q. Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?

A. That is right. He is the man who would be held responsible for setting aside the required amount of raisins.

Q. I take it that that man would not have title to any raisins as he is a toll packer; is that correct?

A. That is right.

Hearing transcript at 182-183, *see* Appendix A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the word acquire as used in the Raisin Order should take precedent over its plain language and the interpretation of its meaning that was conveyed to them by the Department of Agriculture. But under *Chevron* the interpretation by an agency of a regulation it issued in implementation of a statute is, unless illegal, controlling. The decision of the Hornes to not follow the Department of Agriculture's interpretative advice, and instead to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided to not file reports, not hold raisins in reserve, not have incoming raisins inspected, not pay assessments, and not allow inspection of their records for verification purposes.

The respondents have also advanced the patently specious argument that they were exempted from handler obligations under the Raisin Order because they were attempting to promote the policy of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006. Nowhere does the 1976 Act refer to the AMAA or make any suggestion that any of its terms have been supplanted. Moreover, the type of activity that the 1976 Act looked to encourage was the farmer market where farmer and consumer could come together directly and avoid middlemen. The respondents were instead marketing raisins to candy makers and food processors as ingredients.

Nor does the fact that the respondents primarily consider themselves to be producers exempt them from regulation by the Raisin Order for their performance of handler functions. The AMAA does exempt from a marketing order's regulation 'any

producer in his capacity as a producer” 7 U.S.C. § 608c(13)(B). This has given rise to specific but limited producer-handler exemption provisions in marketing orders that regulate the handling of milk. The potential harm, these exemptions may inflict on other producers and handlers was, however, recognized and explained in *United Dairymen of Arizona v. Veneman*, 279 F.3d 1160, 1165-1166 (9th Cir 2002).

In the instant proceeding, the respondents undertook to no longer confine themselves to producer functions but to also engage in handler functions that are regulated by the Raisin Order and are not within any exemption. The fact that a portion of the raisins they packed at the Lassen Vineyard packing house were raisins of their own production did not serve to exempt their handling and packing of those raisins from regulation. Mr. and Mrs. Horne had been specifically so advised by letter, dated May 20, 2002, from the Administrator of AMS:

You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order’s regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.

RX-101, Appendix B

Under these circumstances, the respondents should be ordered to pay the assessments they withheld from the RAC, pay the dollar equivalent of the raisins they failed to hold in reserve, and be assessed a civil penalty pursuant to 7 U.S.C. § 608c(14)(B).

In determining the amount of the civil penalty, I have reviewed the recommendation of AMS in light of applicable holdings by the Judicial Officer respecting the appropriate amount to be imposed for violations similar to those

committed by the respondents. *See Calabrese*, 51 Agric. Dec. 131, 161 (1992); *Saulsbury Enterprises*, 55 Agric. Dec. 6, 52-58 (1996); and *Strebin Farms*, 56 Agric. 1095, 1152-1157 (1997). Intentional violations of a marketing order's requirements that a handler shall pay assessments, have inspections performed, hold a percentage of the raisins handled in reserve, and file specified reports have all been held to be serious violations of both the AMAA and or a controlling marketing order that fully warrant civil penalties of \$1,100 for each violation with "...each day during which such violation continues...deemed a separate violation..." (7 U.S.C. § 608c(14(B))).

Accordingly, I am following the recommendation of AMS that civil penalties be imposed on the respondents of \$651,200, \$1,100 per day for each of the 592 days of the crop years 2002-2003 and 2003-2004 that they failed to hold California raisins in reserve, and \$80,300 for their failure to obtain inspections and file accurate reports. Civil penalties in these amounts are needed to deter the respondents from continuing to violate the Raisin Order and to deter others from similar or future violations. *See Calabrese, supra* at 162.

The following Order is herewith issued.

ORDER

It is ORDERED that respondents, Marvin D. Horne, Laura R. Horne and Don Durbahn, who do business as Lassen Vineyards, a general partnership, jointly and severally, are assessed a civil penalty of \$731,500, are further ordered to pay to the Raisin Administrative Committee \$9,389.73 in assessments for crop years 2002-2003 and 2003-2004, and are further ordered to pay to the Raisin Administrative Committee \$523,037

for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004.

A certified check or money order in payment of the civil penalty shall be sent in the amount of \$731,500 made payable to “Treasurer of the United States” to Frank Martin, Jr. or Babak A. Rastgoufard, Office of the General Counsel, Room 2343-South Bldg., United States Department of Agriculture, Washington, DC 20250-1417. Payments of the \$9,389.73 for owed assessments, and of the \$523,037 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the Raisin Administrative Committee. These payments shall all be made within 100 days after this order becomes effective.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. § 1.142(c)(4).

Copies of this Decision and Order shall be served upon the parties.

Done at Washington, D.C.
this 8th day of December, 2006

Victor W. Palmer
Victor W. Palmer
Administrative Law Judge